

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Robert Lee Bailey,

Petitioner,

v.

United States of America,

Respondent.

**MEMORANDUM OPINION  
AND ORDER**

Civil No. 07-4257 ADM

Criminal No. 03-370 ADM/AJB

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Robert Lee Bailey, *pro se*.

Erica H. MacDonald, Esq., Assistant United States Attorney, 300 South Fourth Street, Suite 600, Minneapolis, MN, for Respondent.

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**I. INTRODUCTION**

This matter is before the undersigned United States District Judge for a ruling on Petitioner Robert Lee Bailey's ("Petitioner") 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence ("§ 2255 Motion") [Docket No. 115].<sup>1</sup> For the reasons set forth below, Petitioner's motion is denied.

**II. DISCUSSION**

In February 2004, a jury convicted Petitioner of transporting two women with the intent to engage in prostitution under 18 U.S.C. § 2421 and for being a felon in possession of a firearm under 18 U.S.C. §§922(g)(1), 924(a)(2). Verdict [Docket No. 68]. In October 2004, this Court sentenced Petitioner to an aggregate term of 140 months in prison. Sentencing Judgment [Docket No. 85]. The Eighth Circuit affirmed Petitioner's conviction but remanded the case for

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<sup>1</sup> All docket references are to Criminal No. 03-370.

resentencing under United States v. Booker, 543 U.S. 220 (2005), which had been decided while the case was pending appeal. United States v. Bailey, 142 Fed. App'x 947, 951 (8th Cir. 2005).

On remand, this Court recalculated Petitioner's guideline range and applied the U.S. Sentencing Guidelines Manual § 2K2.1(b)(5) enhancement for possessing a firearm in connection with the commission of another felony offense. Petitioner again appealed arguing that the application of the § 2K2.1(b)(5) enhancement was vindictive, without support in the record, and not premised on adequate factual findings. United States v. Bailey, 206 Fed. App'x 650, 653 (8th Cir. 2006). The Eighth Circuit affirmed Petitioner's sentence providing the following explanation: "The district court, moreover, correctly applied the § 2K1.2[sic](b)(5) adjustment. A sentencing judge, who presides over a defendant's trial, 'may rely on evidence submitted at trial to support the sentence imposed.'" Id. (quoting United States v. Burns, 276 F.3d 439, 443 (8th Cir. 2002)).

Petitioner now brings a § 2255 motion challenging his sentence. Petitioner contends that this Court's application of the § 2K2.1(b)(5) enhancement violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004), because it is based on facts not found by a jury but by this Court. Because this issue was raised by Petitioner in his second appeal and decided by the Eighth Circuit, he cannot relitigate this issue in a collateral proceeding based on 28 U.S.C. § 2255. United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001) (stating that "issues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255"). There is an exception to the rule against relitigating matters decided on direct appeal where relief is necessary to avoid a miscarriage of justice, such as where a

petitioner comes forth with convincing new evidence of actual innocence. Id. Such is not the case here and thus Petitioner does not qualify for the miscarriage of justice exception.

### **III. CONCLUSION**

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Docket No. 115] is **DENIED**.

BY THE COURT:

s/Ann D. Montgomery  
ANN D. MONTGOMERY  
U.S. DISTRICT JUDGE

Dated: January 22, 2008.